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Supreme Court of the United States

OCTOBER TERM, 1954

No. 653

JOSE MARQUES COUTO,

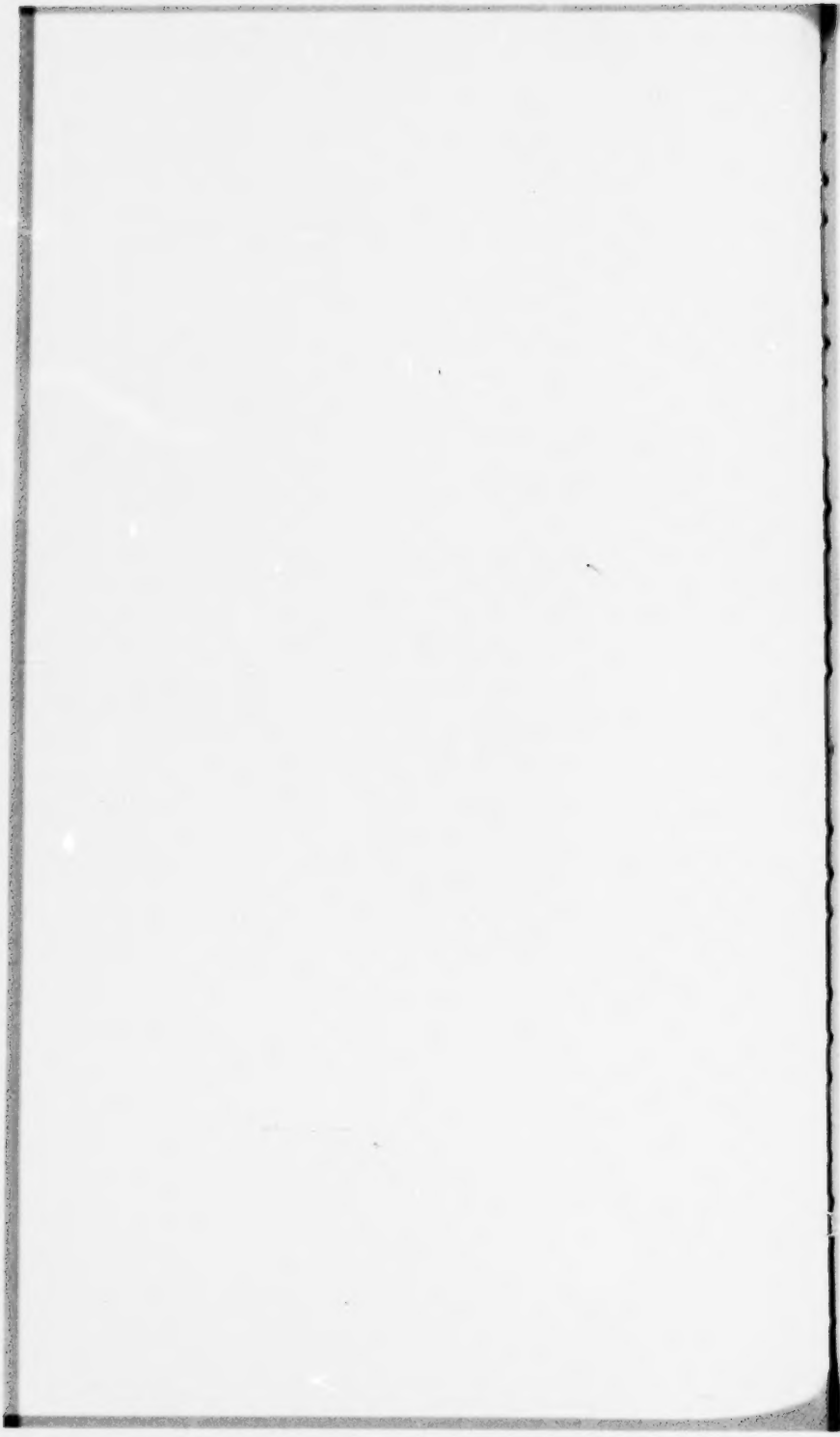
Petitioner,

vs.

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization for the District of New York.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Aaron L.
NEMEROFF, JELLINE, DANZIG & PALEY,
Attorneys for Petitioner.



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Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

JOSE MARQUES COUTO,
Petitioner,

vs.

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization for the District of New York.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the dismissal by the United States District Court for the Southern District of New York, of an action petitioning for review of an order directing his deportation.

Opinion Below

The opinion of the District Court is reported in 123 Fed. Supp. 926, and in Appendix A, infra, pp. 13-24.

The opinion of the Court of Appeals is not yet officially reported but is reported in Appendix A, infra, pp. 26-29.

Jurisdiction

The judgment of the Court of Appeals was entered on January 20, 1955. The jurisdiction of this Court is invoked under Section 28 U. S. C. 1254 (1).

Question Presented

1. Whether deportation hearings held under the Immigration and Nationality Act of June 27, 1952, must conform to any requirements of the Administrative Procedure Act.

Statutes Involved

The pertinent provisions of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. 1101, et seq., and of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, et seq., are set forth in Appendix B, infra, pp. 29-37.

Statement

The petitioner instituted an action in the United States District Court, Southern District of New York, petitioning for review of an order directing his deportation. Said petition was grounded upon Section 10 of the Administrative Procedure Act (5 USCA 1009). The petition was filed on July 2, 1954, and petitioner at that time, by order to show cause, moved for a temporary injunction against respondent. On July 9, 1954, respondent moved for summary judgment against petitioner. The two motions were heard by the District Court on July 20, 1954. On September 7, 1954, the District Court rendered its opinion denying petitioner's motion for a temporary injunction and granting respondent's motion for summary judgment.

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Petitioner contended that the proceedings were void for failure to comply with the Administrative Procedure Act. The respondent conceded that the Administrative Procedure Act had not been complied with, but contended that there was no necessity to comply therewith. The District Court, in granting respondent's motion for summary judgment, held that there was no necessity to comply with the Administrative Procedure Act in deportation proceedings held pursuant to the Immigration and Nationality Act of 1952.

On appeal, the Court of Appeals for the Second Circuit affirmed the order of the District Court holding that deportation hearings held pursuant to the Immigration and Nationality Act of 1952 need not comply with the requirements of the Administrative Procedure Act.

Reasons for Granting the Writ

In *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, it was held that in the absence of specific exempting legislation the Administrative Procedure Act was applicable to deportation proceedings.

In the Court below the petitioner cited the following eight statutory protections of the Administrative Procedure Act, not inconsistent with Section 242 (b) of the Immigration and Nationality Act, which petitioner contends should have been applicable to the hearing:

1. All examiners who conduct hearings of an administrative nature shall be subject to the Civil Service Law (5 USCA Sec. 1011).

2. Such examiners shall be assigned to cases in rotation so far as practicable (5 USCA Sec. 1011).

3. Such examiners shall perform no duties inconsistent with their duties and responsibilities as examiners (5 USCA Sec. 1011).

4. Such examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (5 USCA Sec. 1011).

5. Examiners shall receive compensation prescribed by the Commissioner independently of agency recommendation or ratings (5 USCA Sec. 1011).

6. No examiner shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate (5 USCA Sec. 1004).

7. No officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall in that or a factually related case participate or advise in the decision, recommended decision or agency review (5 USCA Sec. 1004).

8. Prior to each recommended initial or tentative decision, the parties shall be afforded a reasonable opportunity to submit for consideration of the officers participating in such decision (1) proposed findings and conclusions or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions and (3) supporting reasons for such exceptions or proposed findings or conclusions (5 USCA 1007 (b)).

In rendering its decision that the Administrative Procedure Act was not applicable to the Immigration and Nationality Act of 1952, the Court of Appeals for the Second Circuit hinged its decision on the decision of *Marcello* v. *Ahrens*, 212 Fed. 830 (C. A. 5th Cir., 1954).

This Court has granted certiorari in said case sub nom. *Marcello* v. *Bonds*, No. 145 O. T. 1954, which is currently awaiting argument before this Court. Both cases involve the important issue as to whether or not the Administrative Procedure Act is applicable to deportation hearings. The

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instant case presents the additional element whether 242(b) of the Immigration and Nationality Act completely exempted deportation proceedings from the Administrative Procedure Act or merely the sections of said Act with which it is inconsistent.

Since certiorari has been granted in *Marcello* v. *Ahrens*, supra, and the decision in that case may very well be determinative of the decision in the instant case, certiorari should be granted herein to protect the petitioner's rights.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

NEMEROFF, JELLINE, DANZIG & PALEY,
Attorneys for Petitioner.

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Appendix A

Oral Decision of Special Inquiry Officer Entered on May 6, 1954

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

Ellis Island, New York Harbor
New York 4, N. Y.

FILE: NEW YORK: 0300-444507

IN RE: JOSE MARIA MARQUES COUTO
IN DEPORTATION PROCEEDINGS
IN BEHALF OF RESPONDENT: Aaron L. Danzig, Esq.

350 Fifth Avenue
New York, N. Y.

(Appearance by Morton Silfen, Esq.)

CHARGES:

Warrant: Immigration and Nationality Act—crewman —failed to comply

Lodged: None

APPLICATION: Voluntary departure in lieu of deportation

DETENTION STATUS: Detained at government expense

WARRANT OF ARREST SERVED: April 23, 1954

DISCUSSION: This record relates to a 34 year old married male, a native and citizen of Portugal, who last entered the United States at the port of Baltimore, Maryland, February 24, 1953 as a member of the crew of the SS Areti. That entry has been verified and the record shows that he was admitted then as a crewman under Section 101(a)(15)(D) of the Immigration and Nationality Act on the condition

that he depart from the United States on the next sailing of his vessel, in any case within 29 days. Since the respondent has not departed, he is now amenable to deportation on the charge in the warrant of arrest under the Immigration and Nationality Act.

The respondent has applied for permission to depart from the United States voluntarily in lieu of being deported. It is his claim that he has never been arrested for or charged with the commission of crimes and that he has been and is a person of good moral character. On the basis of his testimony it will be held that he is statutorily eligible for the privilege for which he has applied. He has stated that his only relative in the United States is an uncle and that he has no dependents in this country. His closest family are his wife and child in Portugal whom he claims to have been supporting by remitting them money. It is his testimony that he has been a seaman by occupation since approximately 1947 and that, although he had entered the United States on several occasions previous to his last arrival, never before has he remained ashore for longer than the period allowed him. It is his claim that he has never been excluded from admission to this country or deported from the United States. He has assets consisting of his savings in the sum of $1,000. He has stated that if now granted the privilege of voluntary departure, he would be willing and is able to leave within the period of the next thirty days. In view of his comparatively long service as a seaman and his previous good record, it is believed that he should be granted one further opportunity to effect his departure without the issuance of a warrant of deportation. Order to that effect will be entered, made conditional however upon his departing within the period of time and under the conditions to be determined by the District Director. If he fails to so depart, deportation will follow. In the event of deportation, he has elected to be returned to Portugal.

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FINDINGS OF FACT: Upon the basis of all the evidence presented, it is found:

(1) That the respondent is an alien, a native and citizen of Portugal.

(2) That the respondent last entered the United States at the port of Baltimore, Maryland, February 24, 1953 as a member of the crew of the SS Areti.

(3) That the respondent was then admitted as a crewman for the period of time his vessel was to remain in the United States, in no case to exceed 29 days.

(4) That the respondent has remained in the United States beyond 29 days.

CONCLUSION OF LAW: Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under Section 241(a)(9) of the Immigration and Nationality Act the respondent is subject to deportation, in that, after admission to the United States as a nonimmigrant, to wit, a crewman under Section 101(a)(15)(D) of the Act, he failed to comply with the conditions of such status.

ORDER: It is ordered that the alien be granted voluntary departure at his own expense in lieu of deportation within such period of time or authorized extensions thereof and under such conditions as the district director or officer in charge having administrative jurisdiction of the office in which the case is pending shall direct.

IT IS FURTHER ORDERED that, if the alien fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the alien deported from the United States in the manner provided by law on the charge contained in the warrant of arrest.

CHARLES G. McCARTHY
CHARLES G. McCARTHY
Special Inquiry Officer

Dictaphone
ebt

Order Dismissing Appeal

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

Jun 10 1954

File: 0300-444507—New York
In re: JOSE MARIA MARQUES COUTO
IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: Aaron L. Danzig, Esquire
350 Fifth Avenue,
New York, New York

CHARGES:

Warrant: Immigration and Nationality Act of 1952—
Crewman—Failed to comply
Lodged: None

APPLICATION: Voluntary departure in lieu of deportation

DETENTION STATUS: Detained at Government expense

This case comes forward on appeal from an order entered by the special inquiry officer on May 6, 1954, directing that the respondent be permitted to depart voluntarily from the United States, in lieu of deportation and further directing that if he failed to depart when and as required that he be deported from the United States pursuant to law on the charge stated in the warrant of arrest.

The respondent, a 35-year-old married male, native and citizen of Portugal, has resided continuously in the United States since his admission at Baltimore, Maryland on February 24, 1953 as a seaman. The respondent has never been admitted to the United States for permanent residence and he was never granted an extension of his temporary period of admission. He has no close family ties or dependents living in this country. His wife and child are natives,

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citizens and residents of Portugal. He is subject to deportation on the charge stated in the warrant of arrest.

Under the applicable regulations, the interpreter, if an employee of the Service, shall not be required to be sworn (8 C. F. R. 242.53(h)). We assume that the interpreter in the case at bar was an employee of the Service. We find no merit to counsel's contention that the special inquiry officer was not qualified to conduct a hearing, since he did not establish his qualifications pursuant to the Administrative Procedure Act as explained by Representative Walter at the time the Immigration and Nationality Act was being debated before the House of Representatives. Likewise, there is no basis for counsel's assertion that with the passage of the Immigration and Nationality Act of 1952, the decision in *Sung* v. *McGrath* requiring that hearing and special inquiry officers be qualified under the Administrative Procedure Act was reinstated and the amendment to the 1917 Act, which had eliminated this qualification, was itself abolished.

Deportation proceedings must conform to procedural due process but need not comply with the Administrative Procedure Act. The following statement appearing in the Conference Report [1] with respect to exclusion and deportation proceedings held under the Immigration and Nationality Act of 1952 is self-explanatory:

> Having extensively considered the problem of judicial review, the Conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework and the pattern of the Administrative Procedure Act. The safeguard of judicial procedure is afforded the alien in both exclusion and deportation proceedings.

[1] U. S. Code Congressional and Administrative News, 82nd Congress, 2nd Session, Vol. 2, page 1754.

The foregoing makes it clear that it was not intended that deportation proceedings should be subject to the specific provisions of the Administrative Procedure Act, but rather that the procedural requirements, laid down in section 242(b) of the Immigration and Nationality Act, were considered by the Congress to be within the pattern of the Administrative Procedure Act and to meet the standards of that Act. We doubt that Congress could have expressed this more clearly than it did by the use of the following language in section 242(b): "The procedure so described shall be the sole and exclusive procedure for determining the deportability of an alien under this section." The procedure followed in the respondent's case was in complete accord with that specified in section 242(b) of the Immigration and Nationality Act and the regulations promulgated pursuant thereto. Therefore, counsel's contention with respect to the Administrative Procedure Act is rejected.

The question of releasing the respondent on bond is a matter for administrative consideration by the Service. After carefully considering all the evidence of record together with counsel's representations on appeal, we find nothing therein that would cause us to make any change in the decision of the special inquiry officer, who has granted the respondent the maximum discretionary relief in the premises. Accordingly, the following order will be entered.

ORDER: It is ordered that the appeal be dismissed.

Chairman

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Memorandum Opinion

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of the Petition for Review of JOSE MARQUES COUTO, Petitioner, vs. EDWARD J. SHAUGHNESSY, as District Director of Immigration and Naturalization for the District of New York, Respondent.	Civ. 94-140 H 21349

APPEARANCES:

NEMEROFF, JELLINE, DANZIG & PALEY, of New York, N. Y., Attorneys for Petitioner: AARON L. DANZIG, Of Counsel.

J. EDWARD LUMBARD, United States Attorney for the Southern District of New York, Attorney for Respondent; HAROLD J. RABY, HAROLD R. TYLER, JR., Assistant United States Attorneys; LESTER FRIEDMAN, Attorney, Immigration and Naturalization Service, Of Counsel.

DAWSON, D. J.:

This is a motion by petitioner for a temporary injunction to restrain his deportation, pending a determination by this Court of a petition to review the deportation pro-

ceedings.* Respondent cross-moves for summary judgment.

It appears from the papers submitted on the motion that the following material facts exist without substantial controversy:

1. Petitioner is an alien, a native and citizen of Portugal.

2. Petitioner entered the United States as a seaman aboard the vessel "Areti", at Baltimore, Maryland, on February 24, 1953.

3. Petitioner overstayed his seaman's leave.

4. On April 22, 1954, petitioner made a statement to the Immigration and Naturalization Service in which he admitted that he was an alien, had entered on a temporary seaman's permit, and had overstayed his leave.

5. On April 23, 1954, a warrant for petitioner's arrest was issued, and deportation proceedings commenced.

6. On May 6, 1954, petitioner was afforded a hearing before a Special Inquiry Officer of the Immigration and Naturalization Service.

7. Petitioner appeared at the said hearing and was represented by counsel of his own choosing.

8. An official interpreter of the Immigration and Naturalization Service was present at the hearing, and interpreted for the petitioner.

---

* A recent decision of the Court of Appeals for this Circuit holds that an action for injunctive relief under Section 10 of the Administrative Procedure Act, 5 U. S. C. Sec. 1009, is a proper procedure for testing the validity of a deportation order, and that the only necessary defendant is the District Director of Immigration. *In the Matter of the Petition for Review of Mampril Sequeira Pedreiro v. Shaughnessy.* F. 2d (decided July 1, 1954).

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9. The official interpreter was not sworn.

10. Petitioner was shown his sworn statement, and under oath, asked if the statements therein were true, to which question he answered in the affirmative.

11. Petitioner's counsel objected to this question and to the inclusion of the sworn statement into the record.

12. At the conclusion of the hearing, it was the decision of the Special Inquiry Officer that petitioner was deportable.

13. An appeal was taken to the Board of Immigration Appeals, which appeal was dismissed on June 10, 1954.

Petitioner contends that the hearing under which the deportation order was issued was void (1) because it did not comply with the Administrative Procedure Act, 5 U. S. C. 1001, et seq. in that the hearing did not comply with the procedures of the Act and was held before a Special Inquiry Officer of the Immigration and Naturalization Service rather than an Examiner having the status and tenure prescribed by the Administrative Procedure Act, (2) that assuming the hearing did not have to comply with the Administrative Procedure Act, there was not legally competent evidence under the Immigration and Nationality Act of 1952, 8 U. S. C. 1101, et seq. to support the deportation order, (3) that assuming the requirements of the Immigration and Nationality Act were complied with, Section 242(b) of that Act, 8 U. S. C. 1252(b), violated the due process provisions of the Constitution in that the Special Inquiry Officer was authorized to present the evidence as well as to conduct the hearing, and (4) that due process was violated in that the interpreter at the deportation hearing was not sworn.

Respondent contends in its motion for summary judgment that all provisions of the Immigration and Nationality

Act were complied with; that there was no denial of substantial justice to the petitioner in the course of the deportation hearing or violation of the due process provisions of the Constitution; that there is no issue of fact to be determined by this Court; that therefore, its motion for summary judgment should be granted.

I

In support of his contention, petitioner urges that the Administrative Procedure Act, 5 U. S. C. 1001, et seq. sets forth the procedure which must be used in a deportation hearing * and further, establishes the status and tenure of the hearing officer before whom the proceeding is conducted, unless subsequent legislation, here Section 242(b) of the Immigration and Nationality Act of 1952, 8 U. S. C. 1252(b), *expressly* provides that a different procedure shall be used and *expressly* sets forth different requirements of status and tenure for the hearing officer.

Petitioner contends that Section 242(b) while expressly setting forth a procedure to be followed in deportation hearings different from that set out in the Administrative Procedure Act and stating that it shall be the "sole and exclusive procedure for determining the deportability of an alien", fails expressly to over-ride the following procedural requirements of the Administrative Procedure Act:

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* See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950); *"The Administrative Procedure Act in Operation,"* 29 N. Y. U. L. Rev. 1173 (June, 1954).

In the *Wong Yang Sung* case, supra, it was held that administrative hearings in proceedings for the deportation of aliens must conform to the requirements of the Administrative Procedure Act. Thereafter, Congress, in the supplemental Appropriation Act for the year 1951 (64 Stat. 1048) 8 U. S. C. 155a (Supp. 1952) expressly exempted deportation proceedings from the Administrative Procedure Act. The Immigration and Nationality Act of 1952 provided expressly that the procedure therein should be the procedure for determining the deportability of an alien.

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1. Section 5, 5 U. S. C. 1004 (c): No hearing officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate.

2. Section 5, 5 U. S. C. 1004 (c): No officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall in that, or in a factually related case, participate or advise in the decision, recommended decision or agency review.

3. Section 8, 5 U. S. C. 1007 (b): Prior to each recommended, initial, or tentative decision, the parties shall be afforded a reasonable opportunity to submit for consideration of the officers participating in such decision (1) proposed findings and conclusions or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions and (3) supporting reasons for such exceptions or proposed findings or conclusions.

This same question was presented in the recent case of Marcello v. Ahrens * where the court said that the argument that the Administrative Procedure Act has the standing of a Constitutional Amendment and Congress is powerless to provide for administrative hearings which do not conform to it has no validity. I agree.

The language of Congress is unmistakable. It provided in the later Act that the procedure therein provided shall be the "... sole and exclusive procedure for determining the deportability of an alien ..." This Act, to the extent that it is inconsistent with the earlier Administrative Procedure Act, must control.

But, in the instant case, petitioner goes further. He says, nowhere in Section 242(b) are set forth express requirements concerning the status and tenure of the

* (5 C. A. 1954) 212 F. 2d 830.

Special Inquiry Officer different from those specified in Section 11, 5 U. S. C. 1010, of the Administrative Procedure Act. (Respondent concedes these requirements were not met.) Petitioner, therefore, contends that the exception set forth in Section 12 of the Administrative Procedure Act, 5 U. S. C. 1011, viz., that the subsequent legislation shall expressly set forth different requirements, has not been met and, therefore, the provisions of the Administrative Procedure Act with respect to the status and tenure of the Special Inquiry Officer are controlling. The question is thus presented whether the language of Section 242(b) of the Immigration and Nationality Act of 1952, 8 U. S. C. 1252b expressly sets forth different status and tenure requirements than those used in the Administrative Procedure Act so that Special Inquiry Officers under the Immigration and Nationality Act of 1952 fall within the exception of Section 12 of the Administrative Procedure Act (5 U. S. C. 1011).

In interpreting the meaning and usage of the term "Special Inquiry Officer", one must look to Section 101(b)(4) (Definitions) of the Immigration and Nationality Act of 1952, 8 U. S. C. 1101 * and read that section together with Section 242(b).

The Attorney General is given the power to choose *any immigration officer* to be a Special Inquiry Officer. Inasmuch as Section 11 of the Administrative Procedure Act of 1946, 5 U. S. C. Sec. 1010, sets forth several requirements for hearing examiners which could not be met by "any immigration officer", it is difficult to conceive of an intent

* "The term 'special inquiry officer' means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this chapter to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this chapter, as the Attorney General shall prescribe."

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upon the part of Congress to so legislate that the Attorney General would be granted powers which could not be fulfilled if the Administrative Procedure Act was controlling. It is therefore consistent with reason and good judgment to find that where Congress established a procedure to be used in a deportation hearing different from that set forth in the Administrative Procedure Act, and in so doing, expressly stated that the hearing be conducted by a Special Inquiry Officer, it intended its definition of Special Inquiry Officer, which vested in the Attorney General the power to appoint and determine the status and tenure of the hearing officer, to control independent of the provisions of Section 9 of the Administrative Procedure Act, 5 U. S. C. 1010.

Petitioner contends that this is contrary to the expressed legislative intent of the drafters of the Immigration and Nationality Act of 1952 and to support his position he cites statements by sponsors of the bill, Senator McCarren (Nev.) and Representative Walter (Pa.), to the effect that the Administrative Procedure Act is applicable to the Immigration and Nationality Act of 1952. See 98 Cong. Rec. 5778 and 98 Cong. Rec. 4416, respectively.* However,

* These statements were:

SENATOR MCCARREN:

"The Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails now. The Senator need not worry about its not being the law, because the Administrative Procedure Act covers the very point which the Senator is attempting to reach."

REPRESENTATIVE WALTER:

"I am sure that if the gentleman would look at page 163, paragraph 46, he will find that the law as it was before the House adopted this amendment to an appropriation bill, has been reinstated and that the decision of the Supreme Court in the SUNG case, will be the law of the land when this Code is adopted." (Page 163, paragraph 46, reference is to the specific section 403(a)(47) repealing the provision of the Supplemental Appropriation Act of 1951 which exempted immigration and naturalization hearings from the Administrative Procedure Act.)

upon reading the portions of the Congressional Record from which these quotes were taken, it appears that the Members of Congress were concerned with judicial review. And in the conference report on the bill, the members on the part of the House, of whom Representative Walter was one, stated with respect to the Administrative Procedure Act:

> "Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework and the pattern of the Administrative Procedure Act. The safeguard of judicial procedure is afforded the alien in both exclusion and deportation proceedings." 2 U. S. Code Congressional and Administrative News 1754 (1952).

It would thus appear that where referring to the Administrative Procedure Act and its safeguards, the sponsors of the bill were speaking with reference to judicial review.* This position has been supported in a recent decision. See *Rubinstein* v. *Brownell*, 206 F. 2d 449 (C. A. D. C., 1953), aff'd 346 U. S. 929.

I therefore conclude that in reading Section 242(b) and Section 101(b)(4) (Definitions) of the Immigration and Nationality Act of 1952 together, Congress has specifically granted to the Attorney General the power to appoint and maintain, with respect to status and tenure, Special Inquiry Officers to conduct deportation proceedings without reference to the status and tenure provisions of the Administrative Procedure Act.**

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* Judicial Review is permitted by Sec. 10 of that Act. 5 U. S. C. 1009.

** Section 11, 5 U. S. C. 1010.

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II

Petitioner contends, however, that even if the Immigration and Nationality Act of 1952 controls the status and tenure of Special Inquiry Officers, Section 242(b) of the Act denies due process and violates the Fifth Amendment in that it authorizes the Special Inquiry Officer also to present evidence.

The Supreme Court of the United States in *Harisiades, ex rel. United States* v. *Shaughnessy* * said—

> ". . . any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry."

Here, the proceeding is executive in nature, as in the *Harisiades* case. Congress has the power to order the deportation of undesirable aliens and may establish the appropriate procedure.** Therefore, a deportation hearing held in accordance with the provisions of a statute does not violate due process merely because some aspects of a judicial hearing are not followed. In order to contend that due process has been violated, there must be a substantial denial of justice.*** That the statute **** pre-

* 342 U. S. 580, 588, 589 (1951).

** *Ng Fung Ho* v. *White*, 259 U. S. 276, 280 (1922); *Bugajewitz* v. *Adams*, 228 U. S. 585 (1913).

*** *Chin Yow* v. *United States*, 208 U. S. 8 (1908).

**** 66 Stat. 209, 8 U. S. C. § 1252(b): "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses * * *."

scribes that a Special Inquiry Officer who conducts the hearing may also present evidence, by itself, is not a proposition so unreasonable as to constitute a substantial denial of justice and thus a deprivation of due process.*

III

Petitioner contends further that the deportation order was not based on legally competent evidence under the Immigration and Nationality Act of 1952. There is nothing in the record which indicates that this contention has merit. Petitioner is in this country illegally. On April 22, 1954, petitioner made a statement to the Immigration and Naturalization Service in which he admitted this fact, to wit, that he was an alien who had entered on a temporary seaman's permit, and that he had overstayed his leave.

A deportation hearing was held on May 6, 1954, at which petitioner was represented by counsel. An official interpreter of the Immigration and Naturalization Service was present and interpreted. At the hearing, petitioner was asked whether the answers given in a sworn statement taken from him previously in which he admitted that he was an alien who had entered this country as a seaman and had illegally overstayed his leave were true. Petitioner stated that the facts therein were correct. Petitioner's counsel objected to these questions and to the introduction into the record of the sworn statement on the ground that they intended to incriminate the petitioner.

A deportation proceeding is not, in nature, a criminal proceeding. Nor is the statement that one is an alien a confession of criminality. *Bilokumsky* v. *Tod.*** Petitioner could have been compelled by legal process to state whether

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* *Marcello* v. *Ahrens* (5 C. A. 1954) 212 F. 2d 830, 837; *U. S. ex rel. Catalano* v. *Shaughnessy* (2 C. A. 1952) 197 F. 2d 65; *Harisiades, ex rel. United States* v. *Shaughnessy, supra.*

** 263 U. S. 149 (1923).

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he was an alien, and how he had arrived in the United States; petitioner's silence, if he had remained silent, could have been construed as evidence of persuasive character. See *Bilokumsky* v. *Tod, supra,* and cases cited there.

There appears to be nothing in the manner in which petitioner's sworn statement was taken that would make it inadmissible in a deportation proceeding; nor anything in the record to give credence to the belief that the decision of the Special Inquiry Officer was not based on substantial competent evidence with respect to (1) petitioner's alienage, (2) petitioner's illegal residence in the United States.

Neither petitioner nor his counsel have raised the substantive question of non-deportability under the present statute.

IV

Petitioner also contends that due process has been violated because the official interpreter of the Immigration and Naturalization Service at his deportation hearing had not been sworn. Not only does the statute fail to make this a necessary requirement (see 8 C. F. R. 242.54(h)), but this Circuit has held in a number of instances that the contention is without merit. *Jeung Bow* v. *United States;** *Lee Sim* v. *United States.*** Said Rogers J. in the *Jeung Bow* case:

> "He was the official interpreter acting under his oath of office, and there is no more reason for putting him under a special oath in each separate case where his services are employed than there is for swearing a judge anew at each trial over which he presides."

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* (2 C. A. 1915) 228 F. 868, 870.

** (2 C. A. 1914) 218 F. 432, 436.

CONCLUSIONS OF LAW

(1) That the hearing upon which the deportation order was based was conducted in accordance with the provisions of the Immigration and Nationality Act of 1952.

(2) That a Special Inquiry Officer of the Immigration and Naturalization Service is authorized by law to conduct a deportation proceeding.

(3) That there is no violation of due process by reason of the fact that the Special Inquiry Officer was authorized by the statute to present evidence in addition to his hearing functions.

(4) That the sworn confession of petitioner was properly admitted into evidence at the deportation proceeding.

(5) That the fact that the official interpreter of the Immigration and Naturalization Service was not sworn was not a violation of due process.

(6) That petitioner is properly deportable.

Motion for summary judgment granted. Motion for temporary injunction denied. Submit order.

Dated: New York, N. Y. September 3, 1954

ARCHIE O. DAWSON
U. S. D. J.

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Order and Judgment

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Petitioner having filed his complaint herein on July 2, 1954 and petitioner's motion for a temporary injunction against the respondent and respondent's cross-motion for summary judgment herein having come on to be heard before this Court on July 20 and August 23, 1954, and Messrs. Nemeroff, Jelline, Danzig and Paley (Aaron L. Danzig, Esq., of Counsel) attorneys for the petitioner, having been heard in support of the motion for a temporary injunction and in opposition to the motion for summary judgment, and J. Edward Lumbard, United States Attorney for the Southern District of New York (Harold R. Tyler, Jr. and Harold Raby, Assistant United States Attorneys, of Counsel), attorney for respondent, having been heard in opposition to the motion for a temporary injunction and in support of the motion for summary judgment, and due deliberation having been had, and upon reading and filing the petition, the answer of the respondent, the administrative record and all the pleadings and proceedings heretofore had herein, and the Court having, on September 7, 1954, filed its decision including its findings of fact and conclusions of law dated September 3, 1954, it is

ORDERED AND ADJUDGED that petitioner's motion for a temporary injunction shall be and hereby is denied, and the cross-motion of respondent for summary judgment is granted, and it is

FURTHER ORDERED AND ADJUDGED that the petition of the petitioner herein shall be and the same hereby is dismissed, and that the respondent herein recover from the petitioner his costs as taxed in the amount of $20.00 and have execution therefor.

Dated: New York, N. Y. September 24, 1954.

ARCHIE O. DAWSON
U. S. D. J.

Judgment entered:

WILLIAM V. CONNELL
Clerk.

Sep. 27, 1954

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 146 October Term, 1954.
Argued Dec. 16, 1954 Decided January 20, 1955

Docket No. 23319

[SAME TITLE.]

Before: SWAN, FRANK and HINCKS, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Archie O. Dawson, Judge.

Petition under Section 10 of the Administrative Procedure Act, 5 U. S. C. A. § 1009, to review an administrative proceeding wherein the petitioner was found deportable from the United States but given leave to depart volun-

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tarily. From an order granting the respondent's motion for summary judgment, 123 F. Supp. 926, and from the resulting judgment of dismissal, the petitioner has appealed. Affirmed.

NEMEROFF, JELLINE, DANZIG & PALEY, Attorneys for Appellant; AARON L. DANZIG, of Counsel.

J. EDWARD LUMBARD, United States Attorney, for Appellee; HAROLD R. TYLER, JR., Assistant United States Attorney, and LESTER FRIEDMAN, Attorney, Immigration and Naturalization Service, of Counsel.

SWAN, Circuit Judge:

The appellant is an alien seaman, a native of Portugal, who was granted shore leave for 29 days when his vessel arrived at a United States port on February 24, 1953. Thereafter he deserted his vessel and has continued to reside here in violation of the immigration laws. Deportation proceedings were instituted on April 23, 1954 and he had a hearing, at which he was represented by counsel of his own choosing, before a special inquiry officer, who found him deportable but gave him leave to depart voluntarily. On June 10, 1954 the Board of Immigration Appeals dismissed his appeal, and he was notified that he must depart on or before July 16, 1954. Prior to that date he instituted the present suit under § 10 of the Administrative Procedure Act, 5 U. S. C. A. § 1009. He moved therein for a temporary injunction and the respondent filed a cross-motion for summary judgment, supported by a complete transcript of the record in the deportation proceedings. Judge Dawson denied the motion for an injunction and granted the motion for summary judgment. The alien has appealed. With the appellee's consent deportation has been stayed pending the appeal.

There is no dispute as to the facts above stated. Obviously the appellant is deportable and the order directing deportation is unassailable unless there was some fatal

defect in the administrative proceedings in which it was entered. The appellant contends that the order was void on two grounds: (1) because the hearing did not conform to the Administrative Procedure Act, and (2) because the official interpreter took no oath at the hearing to interpret truthfully.

In *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, it was held that administrative hearings in deportation proceedings must conform to the requirements of the Administrative Procedure Act. But the applicability of that decision was of short life. On September 27, 1950 there was enacted Public Law 843, 64 Stat. 1048, which declared: "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act (5 U. S. C. 1004, 1006, 1007)." Public Law 843 was repealed by the Immigration and Nationality Act of 1952. The exemption it declared was no longer necessary. The new Act substituted a complete code of law covering the field of immigration and nationality. Section 242(b) of the Act, 8 U. S. C. A. § 1252(b), sets forth the precise administrative procedure for the conduct of deportation proceedings, and states that "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." Since deportation hearings are thus specifically provided for by statute, they are clearly within the exception set out in section 7(a) of the Administrative Procedure Act, 5 U. S. C. A. § 1006(a). Such was the holding of the Fifth Circuit in *Marcello* v. *Ahrens*, 212 F. 2d 830, 836. We agree with that decision.

The second point requires little discussion. Forty years ago this court held that an official interpreter, acting under his oath of office, need not be put under a special oath in each separate case. *Jeung Bow* v. *United States*, 2 Cir., 228 F. 868, 870; *Lee Sim* v. *United States*, 218 F. 432, 436. The presently effective Regulations expressly provide that

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he need not. 8 C. F. R. 242.53(h). Furthermore, if this were a procedural defect, the alien waived it. He made no request at the hearing before the special inquiry officer that the interpreter be sworn, and first raised the objection on his administrative appeal. This was too late. See United States ex rel. Beck v. Neelly, 7 Cir., 202 F. 2d 221, 224. Finally, there is no suggestion that the interpreter was not qualified in the Portuguese language or misinterpreted in any respect. Procedural irregularities must be prejudicial to justify judicial intervention. See *Sumio Madokoro* v. *Del Guercio*, 9 Cir., 160 F. 2d 164, 167, cert. denied 332 U. S. 764.

Judgment affirmed.

Appendix B

SECTION 5, ADMINISTRATIVE PROCEDURE ACT, 60 STAT. 239, JUNE 11TH, 1946, CHAPTER 324 (5 USCA 1004)

Sec. 1004. Adjudications

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 1010 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

NOTICE OF HEARING AND ISSUES

(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties of their representatives.

PROCEDURE

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

AUTHORITY AND FUNCTIONS OF OFFICERS AND EMPLOYEES

(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or

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subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

DECLARATORY ORDERS

(d) The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

SECTION 7, ADMINISTRATIVE PROCEDURE ACT, 60 STAT. 241, JUNE 11, 1946, C. 324 (5 USCA 1006)

Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to section—

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and

of officers participating in decisions in conformity with section 1007 of this title shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 1007 of this title, and (9) take any other action authorized by agency rule consistent with this chapter.

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, by every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any

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party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

SECTION 8, ADMINISTRATIVE PROCEDURE ACT, 60 STAT. 242, JUNE 11, 1946, c. 324 (5 USCA 1007)

Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title——

(a) In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 1004 of this title, any other officer or officers qualified to preside at hearings pursuant to section 1006 of this title) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issue upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the

evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SECTION 12, ADMINISTRATIVE PROCEDURE ACT, 60 STAT. 244, JUNE 11, 1946, C. 324 (5 USCA 1011)

Impairment of rights; effect on other laws; separability; subsequent legislation; effective date

Nothing in this chapter shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this chapter or the application thereof

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is held invalid, the remainder of this chapter or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this chapter through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly. This chapter shall take effect three months after its approval except that sections 1006 and 1007 of this title shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 1010 of this title shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

IMMIGRATION AND NATIONALITY ACT, SECTION 242 (b), 66 STAT. 208, JUNE 27, 1952, c. 477, TITLE II, CH. 5

"A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry office, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes

that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulation shall include requirements that——

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section * * *."

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